DOCUMENT RESUME

ED 374 569 EA 026 153

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TITLE Democratic Value Inculcation in Public Schools: The Role of the Constitution and the Courts.
PUB DATE Apr 94
NOTE 33p.; Paper presented at the Annual Meeting of the American Educational Research Association (New Orleans, LA, April 4-8, 1994).
PUB TYPE Viewpoints (Opinion/Position Papers, Essays, etc.) (120) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Academic Freedom; *Constitutional Law; Court Litigation; Democracy; *Democratic Values; Elementary Secondary Education; Equal Protection; Freedom of Speech; *Public Schools; *Role of Education; *Values

ABSTRACT

This paper argues that the fundamental purpose of public education is preparation for citizenship and democratic participation through the inculcation of American democratic values. These values are codified by the Constitution and are further illuminated by the nation's courts and other public institutions. The paper calls for a recommitment to the American common school and a return to its democratic foundations that hold the most potential for improving children's lives. Democratic values upheld by the Constitution and the courts include religious freedom, freedom of speech, and equal protection. What is needed is not a rejection of the concept of the common school, but a revitalization of American public education consistent with America's democratic heritage. American public schools must model and promote the highest ideals of the Constitution and inculcate these values of American democracy for the safe protection of succeeding generations. (Contains 96 references.) (LMI)

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DEMOCRATIC VALUE INCULCATION IN PUBLIC SCHOOLS: THE ROLE OF THE CONSTITUTION AND THE COURTS.

John Dayton*

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(Paper presented at the Annual Meeting of the American Educational Research Association, New Orleans, Louisiana, April 4-7, 1994.)

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DEMOCRATIC VALUE INCULCATION IN PUBLIC SCHOOLS: THE ROLE OF THE CONSTITUTION AND THE COURTS.

John Dayton*

Public schools are increasingly disparaged by many Americans, and calls for privatization of education have intensified.[1] At the core of this discontent is a debate about the fundamental purpose of public education and whose interests the public schools should serve. Objections to public schools are as varied as the groups that voice them. Some citizens' objections to public schools are related to the content of the public school curriculum.[2] Others want to make public educational funds available for private consumer choices in education.[3] Those without children in public schools question the utility of paying taxes to educate the children of others.[4] The rhetoric of special interest groups over public schools and other public policy issues continues to intensify, and many Americans are becoming increasingly desensitized to the needs of those that do not share their interests.[5] Regrettably, the concept of community responsibility is often lost in the struggle for partisan advantage.[6] As factional struggles escalate, the unity of the American people is threatened. One commentator stated that "the very fabric of society is being torn asunder" by internal division and the lack of a shared common purpose.[7]

It is ironic that our public schools are facing growing

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challenges to their very existence at a time when the cohesive bond of common schools is most needed. Despite the complaints of public school critics, American public schools continue to be a vital public institution necessary to the perpetuation of a free and democratic nation.[8] American public schools have been credited with enabling the United States to cope with the challenges of diversity better than any other nation.[9]

However, today's public schools face significant problems. Children are increasingly harmed by poverty, crime, drugs and abuse. Children inevitably bring the scars of these social ills with them into the public schools. More instruction in basic skills is not what these children need most. Before academic instruction can be effective and meaningful for these children, and all children, they must first understand how public education is relevant to improving their circumstances. Public education must empower children to become active participants in a democratic community with the common goal of improving their lives and the circumstances of their community. This article argues that the fundamental purpose of public education is preparation for citizenship and democratic participation through the inculcation of American democratic values.[10] These American democratic values are codified by the Constitution, and further illuminated by our nation's courts and other public institutions. This article calls for a recommitment to the American common school, and a return to its democratic foundations as the institution that continues to hold the greatest promise for

improving the lives of our children by uniting the diverse American people in the common goal of advancing our free and democratic nation.[11]

DEMOCRATIC VALUE INCULCATION AS THE FUNDAMENTAL PURPOSE OF PUBLIC EDUCATION

Much of the mediocrity that currently plagues public schools results from the absence of a clear sense of purpose.[12] But public schools need only reflect on their history to rediscover their fundamental purpose. Public leaders, judges, and scholars throughout our nation's history have consistently recognized that in a democratic nation, public education's fundamental purpose is to prepare citizens to participate in collective governance of their common democratic community and nation.[13] As Guy noted "from the time of the War of Independence, Americans sought to create institutions that would be uniquely American. They especially desired to make education part of a larger political transformation and thus the common school served as an ideal vehicle."[14] The United States formed systems of free common public schools so that these common public schools could assist in forming and perpetuating a free common democratic nation.[15]

Individuals are not born with an understanding of the values of democracy.[16] Education in democratic processes is required.[17] Through the public schools, children must be taught the values and skills necessary to administer, protect, and perpetuate a free democratic system of governance. Our nation's public

schools function as the nurseries of our democracy. We cannot expect children to develop a commitment to democratic principles if these principles are not taught, modeled and practiced in our public schools and other public institutions.[18] Although academic and vocational preparation are important functions of public education, these skills would be of limited value without the freedom and democracy our constitutional system of governance guarantees.[19] Freedom and democratic rule are prerequisites to the American conception of individual, social, and financial fulfillment.[20] Democratic education is "essential to the preservation of the entire constitutional plan."[21]

Public schools continue to be a vital medium for inculcating American democratic values, and in realizing the critical intergenerational trust of perpetuating democracy. Each generation must learn that the duty of their generation is not only to themselves, but also to those in the past who created and sustained the republic and to those in the future that will inherit it. As Cubberley noted "the proponents of the common school were seeking the nurture of a common core of sentiment, of value, and of practice within which pluralism would not become anarchy."[22] The public schools were to function as a value inculcating institution, ensuring American unity and the perpetuation of democracy in succeeding generations.

THE LEGITIMACY OF VALUE INCULCATION IN A DEMOCRATIC NATION

Americans are granted political power by our democratic form of governance. This power carries with it the responsibility of judicious exercise of that power. Since all members of the public are governed by the collective decisions of the electorate, the public has a legitimate interest in assuring that the future governors of the state are prepared to responsibly assume their duties. In the United States broad public education is essential to the survival of the American ideal of democracy. Through education children must recreate in their own minds an understanding of the basic principles that define our nation so that they will be prepared to govern themselves based on democratic ideals. As White recognized "Americans are a nation born of an idea; not the place, but the idea, created the United States."[23] While some nations are founded on common ethnicity, religion, and geography, the cohesive force across the diverse ethnicities, religions and geographical regions of America is a common set ideals: A belief in democratic principles.[24]

Scholars have consistently recognized that the inculcation of democratic values is a necessity in a democratic nation, and that democratic value inculcation is a legitimate function of public education. Regarding the inculcation of democratic values, Will recognized that: "Democratic government must be a tutor as well as a servant to its citizens, because citizenship is a state of mind."[25] As Beard noted "public education must prepare pupils for citizenship in the Republic . . . it must

inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[26]

Our nation's courts have also affirmed the legitimacy of value inculcation in public schools. The U.S. Supreme Court in interpreting the Constitution has repeatedly recognized the legitimacy of value inculcation by public schools.[27] In *Brown v. Board of Education* the Supreme Court recognized public schools as "a principal instrument in awakening the child to cultural values."[28] In *Plyler v. Doe* the Court recognized "the pivotal role of education in sustaining our political and cultural heritage."[29] The Court in *Ambach v. Norwick*, cited John Dewey's view that public schools are "an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground."[30] The Court has recognized that our public schools inculcate in tomorrow's leaders the "fundamental values necessary to the maintenance of a democratic political system."[31] According to the Court: "These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists."[32] Regarding the legitimacy of value inculcation in public schools the Court has concluded that:

> Indeed, the Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs, and these democratic principles obviously are constitutionally incorporated into the structure of our government. It therefore seems entirely appropriate that the State use "public schools to . . . inculcate fundamental

values necessary to the maintenance of a democratic political system."[33]

DECIDING WHICH VALUES TO INCULCATE IN PUBLIC SCHOOLS

Both scholarly research and the decisions of our nation's courts affirm the public school's vital role in inculcating values. But what values should be inculcated? The Court has cautioned that the school's "undeniable, and undeniably vital, mandate to inculcate moral and political values is not a general warrant to act as 'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position."[34] Clearly public schools cannot indoctrinate dogmatic beliefs, but may legitimately inculcate democratic values. As Stewart noted "students must be shown that there exists a middle ground between blind adherence to a monolithic orthodoxy and the nihilistic belief that no idea is better than any other."[35] There is a significant distinction between indoctrination and democratic value inculcation. In contrast to the process of indoctrination in dogmatic beliefs, inculcation in democratic values leads to greater self-reliance and independent thought, with the goal of empowering a thoughtful, independent and responsible citizen.[36]

Democratic education is by definition nondogmatic in that while democratic systems may have favored views, tolerance of minority opinions is a principle tenet of democratic systems of belief. Democratic principles reject a particular orthodoxy of belief. Instead, democratic classrooms are a "marketplace of

ideas."[37] However, because democratic principles are open does not mean they are empty.[38] There are broad but clear principles established by the American democratic tradition.[39] Rohr's concept of "regime values" is instructive regarding the identification of these American democratic values. According to Rohr, American regime values are "the values of that political entity that was brought into being by the ratification of the Constitution that created the present American republic."[40] These American regime values are rooted in ethical norms derived from the prominent values of the regime; can be found in the laws of the regime; and are normative for public officials because they have taken an oath to uphold the constitutions and laws of the regime.[41] The Constitution codifies the principles that originally united our nation, and continues to provide guidance for our evolving constitutional democracy.

THE CONSTITUTION AS A FOUNDATION FOR DEMOCRATIC VALUES

The Constitution is the foundation for our nation's democracy, and therefore should be the foundation for our nation's democratic institutions including public schools.[42] In a nation of diversity, our Constitution is a unifying force. The Constitution acts as our nation's "superego." It is the place where we deposit our nation's highest ideals for safekeeping. Ideals such as freedom, equality, due process, and fundamental fairness and justice. But the Constitution does more than declare noble ideals. It also compels government officials to

comply with these ideals through the force of law.[43]

The Constitution contains values and principles derived from the perpetual human struggle for freedom, democracy, and basic human rights.[44] These constitutional values and principles are based on fundamental human nature and have been thoroughly tested through human history before and after the adoption of the Constitution.[45] Since these values and principles are based on fundamental human nature and tested through human history, they are as relevant today as they were when they were adopted.

The Values Embodied in the Constitution

The identification of American democratic values in the U.S. Constitution is not a precise science, and the purpose of this article is not to produce an exhaustive list of American democratic values. In fact, to do so would be contrary to the intentions of our Constitution's founders. Our Constitution's founders did not intend that their words would be interpreted in a narrow and final way, and that we would believe that we had divined for all time the answers to the most difficult issues facing our nation.[46] Instead, the Constitution is a living document that embodies broad principles that guide us in our struggles with the pressing issues of the day.[47] These principles invite us to interpret their meaning in light of our current circumstances. The principles of the Constitution are like a distant beacon: clear enough to provide manifest direction and guidance, but far enough away to allow for debate regarding the best route to our common goal.

Nonetheless, some broad American democratic values can be identified from the documents that gave birth to our democratic nation: the Declaration of Independence; the U.S. Constitution; and the Bill of Rights. These documents recognized basic human freedoms of belief and expression, the equality of persons, rights to fair treatment by government agents, and limitations on the scope of government power.[48] Gunnar Myrdal identified an "American Creed" through which Americans hold in common "the most explicitly expressed system of general ideals of any country in the West: the ideals of essential dignity and equality of all human beings, of inalienable rights and freedoms, justice, and opportunity."[49] Schlesinger noted that the schools and courts teach the principles of the American Creed and that Gunnar Myrdal "saw the Creed as a bond that links all Americans . . . and as the spur forever goading Americans to live up to their principles."[50]

For greater specificity regarding the values in the Constitution, it is useful to examine the opinions of our nation's courts in interpreting American democratic values. As Peck noted: "Independent courts are especially well situated to discern these values precisely because they are largely isolated from traditional political processes and thus capable of searching for truths that only become manifest over time."[51]

Court Opinions on American Values

Rohr also noted that "the study of Supreme Court opinions offers interpretations of values that are useful" in thinking

about American democratic values.[52] Justices of the Supreme Court use the vehicle of a particular case to teach about American democratic values.[53] As does Peck, Rohr argues that analysis of the Supreme Court's cases are "particularly suitable for ethical reflection on the values of the American people."[54] Further, "[n]ot only do the Court's opinions offer reflection on American values, but they show what these values mean in practice as well."[55]

One of the values identified in the U.S. Constitution is religious freedom. Religious freedom is a fundamental right under the U.S. Constitution.[56] However, the First Amendment to the Constitution merely states that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[57] To determine how public schools must function regarding this constitutional value, it is necessary to examine the Court's decisions on religious issues in the public schools. The Court's cases teach that the schools must respect but cannot promote religious beliefs.[58] What is required by the Constitution is governmental neutrality regarding religion.[59] American constitutional values related to religion promote tolerance of religious diversity in the public realm, but leave matters of religious belief to the private sphere.

The documents that founded our nation reflect the Lockean theory of social contract. According to this theory, when autonomous individuals left the state of nature and agreed to submit to collective governance, individuals retained certain

basic rights and it was the duty of a just government acting under the consent of the governed to protect those rights.[60] While governments may legitimately influence those elements that are properly within the sphere of public control, all persons retain certain fundamental rights that remain within the private sphere of influence and are not proper subjects for public control absent a compelling governmental interest.[61] By prohibiting religious involvement by government the Court is protecting the private rights of religion from intrusion from the public sphere, and teaching that democratic governments respect individual belief and the proper limits of governmental authority in private matters.

The Constitution also states that: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[62] The Court has employed the broad constitutional values embraced by this language to impart to public schools many important lessons about how these constitutional values should be communicated in the public schools. It was in the context of a dispute about the rights of students to express their opposition to government activities that the Court stated that: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[63] In *Tinker v. Des Moines Independent School District* the Court recognized that: "Students in school as well as out of school are

'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."[64]

Although recognizing a constitutional right to dissent, the Court has also emphasized the importance of teaching children mutual tolerance and civility in debating controversial issues in a democratic society. The Court stated that public schools "must inculcate the habits and manners of civility"[65] and that this must "include tolerance of divergent political and religious views, even when the views expressed may be unpopular."[66] As Justice Holmes recognized, the Constitution embodies "the principle of free thought--not free thought for those who agree with us but freedom for the thought that we hate."[67] In conjunction with rights to freedom of expression, the Court has emphasized the responsibility of civility in communication. The Court noted that: "Indeed the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others . . . The inculcation of these values is truly the 'work of the schools.'"[68] The Court is teaching that children should understand that divergent views are tolerated in a democratic society, and that civil discourse is the appropriate way to express your views and your opposition to even those views that may anger you. As a U.S. district court judge stated:

> I am firmly convinced that a course designed to teach students that a free and democratic society is superior to those in which freedoms are sharply curtailed will fail entirely if it fails to teach one important

> lesson: that the power of the state is never so great that it can silence a man or woman simply because there are those who disagree. Perhaps that carries with it a second lesson: that those who enjoy the blessings of a free society must occasionally bear the burden of listening to others with whom they disagree, even to the point of outrage.[69]

An enlightened understanding of American freedoms acknowledges that rights and responsibilities are complementary. The expectation of personal rights of belief and expression requires that individuals must exercise tolerance and civility regarding the beliefs and expressions of others.[70]

Equality is another principle American democratic value. Thomas Jefferson and the other signers of the Declaration of Independence proclaimed this principle, stating that: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[71] The Fourteenth Amendment to the U.S. Constitution and subsequent judicial interpretations expanded on the historically narrow conception of who was entitled to equal treatment. The Fourteenth Amendment states that: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[72]

As with the provisions of the First Amendment, the language of the Fourteenth Amendment establishes only a broad principle. The Fourteenth Amendment's application to a particular situation is subject to interpretation. The Court has developed a three tiered framework for reviewing governmental actions alleged to

deny any person of the equal protection of the laws. Under this framework the Court subjects governmental actions that effect fundamental rights or suspect classes to strict scrutiny, actions that discriminate based on gender, age, or legitimacy to intermediate scrutiny, and other general government regulations to a mere rational basis test.[73] The Court's framework for evaluating equal protection claims recognizes that certain groups have a history of unequal treatment in the U.S. Allegations involving governmental discrimination against members of those groups requires careful judicial review.

The Court used the provisions of the Fourteenth Amendment to eliminate America's racially based dual system of public schools in *Brown v. Board of Education*.[74] In holding that public school segregation based on race denied children the equal protection of the laws, the Court in *Brown* declared that:

> Today, education is perhaps the most important function of state and local governments . . . it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[75]

Brown v. Board of Education opened the door for others to challenge unequal treatment based on race, national origin, gender or disabilities.[76] The American conception of equality continues to evolve. The lesson that the Court is teaching is the fundamental equality of all persons in a democratic nation. Persons that are similarly situated must be afforded the equal protection of the laws, and only legitimate distinctions may be

considered for differential treatment by the government.

Utilitarian Benefits of Inculcating American Values

The values and principles contained in the Constitution should be a guiding force for public education in a democratic society not only because they carry the power of law, but because education based on these values has ethical, egalitarian, and utilitarian benefits for public schools, individuals, and the larger society. For example, religious neutrality by the government is more than just a good legal policy.[77] There are significant utilitarian benefits associated with this constitutional value. As the Court has noted "a union of government and religion tends to destroy government and to degrade religion."[78] Current and historical events demonstrate that differences in religious beliefs are at the heart of many civil disturbances and wars. If government goes into the business of promoting religion, a conflict over whose religion should be the official religion is inevitable in a religiously diverse society. These conflicts disrupt and may eventually destroy civil government. If the religious dispute is resolved through compromise instead of conflict, it is likely that no one will be fully satisfied with the negotiated outcome. Compromised and diluted state religion degrades the sacredness of the religious message. The Court has noted that our nation's founders recognized that "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[79] The Court further noted that the religious values

of the Constitution "rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand."[80] The Court has recognized that the provisions of the Constitution moderate the potential tyranny of majority rule in a democracy. If left totally unchecked, the will of the majority can punish a minority with a tyranny that rivals that of any dictator.[81] The Constitution identifies certain rights and a sphere of privacy that is protected even from the democratic will, and sometimes tyranny, of the majority. As the Court has recognized: "One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcomes of no elections."[82]

There are also utilitarian benefits of constitutional protection of freedom of expression. Political, intellectual, and artistic freedom of expression avoids the political and creative stagnation that plagues many less free societies. In America constitutional guarantees protect these rights not only for the benefit of individuals, but also for the free flow of information that leads to political, intellectual, and cultural advancement. Good ideas flourish in a free environment where the only controls these ideas are subjected to are the tests of public debate and the reason of an educated and free people.[83] Similarly, ideas that are potentially dangerous to the republic are also best refuted in open debate. Open public debate and the reasoning power of an educated and free people are the best

protections against threats to democracy.[84] As Thomas Jefferson declared after prevailing in one of the most bitter political battles in our nation's history: "if there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[85]

Equal protection of the laws has utilitarian benefits also. Creating dual public systems based on race was economically inefficient. Further, excluding large segments of the population from economically productive activities because of their race, nationality, gender, or disability relegated potentially highly productive persons to low level or dependent economic status. Exclusion of groups of persons from mainstream society had a tremendous personal and emotional cost also. As the Court stated in *Brown v. Board of Education*, regarding African-American children: "To separate them from others of similar age qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[86] Without access to education and the possibility of social parity, no group can advance and escape the social stigmas and prejudices that relegated them to their initial positions of disadvantage.[87] Exclusion of disabled children from education and mainstream society was especially tragic. Some disabled persons spent their lives in helpless and isolated circumstances

because they were denied access to educational services and social opportunity.[88] Not only were individuals' lives irreparably harmed by exclusion from society and denial of equal protection of the laws, but society also forfeited the unique talents these individuals could have contributed to our nation's common good.

Many lessons about American democratic values can be learned from our nation's historical mistakes. Despite our nation's democratic ideals, our democratic system has sometimes faltered. Clearly our nation has sometimes failed to provide its citizens with the due process of law, and the fundamental fairness and equality demanded by our democratic ideals. For example, in 1857 the U.S. Supreme Court held in the case of *Dred Scott v. Sanford*, that African-Americans as slaves were not citizens of any state or of the U.S. and could therefore be denied legal rights.[89] Also, during W.W. II Japanese-Americans were imprisoned because of their ancestry.[90] But these failures in government action were not failures of democratic ideals or the Constitution, but failures by government officials to fully comprehend, respect, and comply with the concepts of equality and basic fairness that continue to evolve from our living Constitution.[91] The duty of the public schools is to make certain that succeeding generations understand democratic principles and do not repeat the mistakes of their predecessors.

Even if a perfect form of government could be designed, the system would require administration by imperfect individuals.

Imperfect human nature is always the source of abuse of power by government officials. Nonetheless, the Constitution establishes an ingenious system of checks and balances that help to compensate for some of the faults of human nature. But as with any other system of governance, the Constitution is not self-administering. The American people must understand the principles of our constitutional democracy, and be prepared to make these ideals a reality. As Peck stated:

> A constitution remains merely words on paper that can be conspiratorially ignored, even by the people as a whole. The task of those who seek an efficacious constitutional system is to make the important principles second nature to the people, to make them a set of common reference points from which governmental authority and individual assertions of right may be judged.[92]

In the United States the people are the ultimate source of political power. When our system of government fails, it is because the American people through their elected representatives fail to make it properly function. When we as a nation understand the principles of American democracy, and are willing to act on those principles, the Constitution is a guiding force that gives us perspective and balance. It helps keep us on a steady course through political pendulum swings, and causes us to be circumspect during the temporary crisis that might otherwise cloud our judgment.

CONCLUSION

As former nations in eastern Europe disintegrate because of their citizens' diversity, Americans should reflect on the impact of diversity on our own nation. What makes diversity a basis for conflict in one nation and a source of strength in another? Since fundamental human nature is largely consistent, one could reason that it is a difference in learned value systems that determines whether diversity is rejected, or respected and celebrated in a particular nation. Our nation's democratic values including fundamental rights, fairness, equality, and tolerance are codified in our Constitution, and should be inculcated through our public schools. Inculcating these democratic values in our children will assure that future generations of Americans will share the unity of American democracy, and also continue to celebrate and benefit from the great diversity of our nation.

Because public schools have sometimes faltered in their mission to inculcate democratic values is no reason to abandon the mission or to abandon common public schools.[93] What is needed is not a rejection of the concept of the common school as some public school critics suggest, but a revitalization of American public education consistent with our great democratic heritage: a renewed covenant of "mutual obligation whereby both the people and the commonwealth benefit."[94] Our nation's public schools should function as the foundation for democratic education and inculcation of common American values, kindling a

revitalization of the civic spirit to permeate society.

Ultimately the children in our public schools will be the next generation of political leaders, judges that interpret the constitution, and the teachers of succeeding generations. If children do not understand the values of democracy, and learn to cherish their freedom, they will not be able to retain the democracy and freedom that their predecessors gave their lives to give to them, nor pass these gifts to their descendants.[95] Public school educators must make sure that the American values of democracy and freedom are in the hearts and minds of the next generation, so that their children will also know the democracy and freedom guaranteed by our Constitution. That is the sworn duty of the public schools, and the sacred trust of each generation of Americans. Our public schools must model and promote the highest ideals of our Constitution and inculcate these values of American democracy for the safe protection of succeeding generations. As our nation's highest Court has recognized: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[96]

BONE PILE

Problem of distinguishing democratic and dogmatic education: substance v. procedure; what to think v. how to think; Problem with separating the two concepts cleanly; how do you teach procedure without invoking some content. You can't, but in contrast to dogmatic education, the value positive element is

minimal. Further, even this small contamination is potentially mitigated by the later achievement of autonomy and independent thought. An independent thinking citizen can later reflect on his educational experience and reject those elements that seem to him irrational or improper. When objecting to dogma, and teaching dogmatic belief is the alternative, alleging that democratic education may be partly dogmatic is a weak argument.

1. *See* John E. Chubb and Terry M. Moe, *America's Public Schools: Choice is a Panacea*, THE BROOKINGS REVIEW (Summer 1990). A fundamental problem with the privatization movement is that it views public education as merely another individual entitlement and ignores the vital public interests served by common public schools. Public education is democratically controlled by the elected representatives of the People. Ultimately it is the People who decide how public education funds are expended. Privatization systems use public funds but limit public control. Allowing private control of public funds circumvents the democratic control and interests of the People.

2. As McCarthy noted: "It has been estimated that approximately 200 organizations are involved in efforts to eliminate specific materials from public schools." MARTHA M. MCCARTHY, PUBLIC SCHOOL LAW 82 (1992).

3. *See supra* note 1.

4. If self-interest is held as a higher criterion than common good, public schools are likely to have difficulty passing bond referendums when significant proportions of the electorate either have no children or send their children to private schools.

5. The proper state of mind for deciding matters of governance is reason and common good, not passion and self-interest. Those who assist government in oppressing others because the immediate action is consistent with their prejudices and self-interests are helping that government to forge the chains which they also will wear in the future. *See* Andrew Hamilton, *Defense of Freedom of the Press, in* THE AMERICAN READER 8 (Diane Ravitch ed., 1990).

6. *See* Edward Pajak, *Change and Continuity in Supervision and Leadership, in* CHALLENGES AND ACHIEVEMENTS OF AMERICAN EDUCATION 159 (Gordon Cawelti ed., 1993).

7. Mary Jane Guy, *The American Common School: An Institution at Risk*, 21 J.L. & EDUC. 569, 580 (1992).

8. Thomas Jefferson recognized education "as the *sine qua non* of a truly viable democracy." THOMAS JEFFERSON, CRUSADE AGAINST IGNORANCE 2 (Gordon C. Lee ed., 1961).

9. Mary Jane Guy, *The American Common School: An Institution at Risk*, 21 J.L. & EDUC. 569, 588 (1992).

10. Democratic education is not value free. But there are significant reasons to prefer democracy and democratic education of the public independent of political value judgements. Most important among these reasons may be the preservation of human life. As Shanker has noted: "The starkest contrast between democratic and nondemocratic governments is in the number of

people that nondemocratic governments kill." Albert Shanker, *Democracy and Democide*, N.Y. TIMES, Feb. 28, 1993, at E-7 (Since 1900 there have been about 149 million murders of people by nondemocratic governments. Shanker notes that in contrast, some democracies reject capital punishment for even the most heinous crimes).

11. As Thomas Jefferson stated: "If a nation expects to be ignorant and free . . . it expects what never was and never will be." Thomas Jefferson, *cited in* LAWRENCE A. CREMIN, THE GENIUS OF AMERICAN EDUCATION 3 (1965).

12. *See* CARL D. GLICKMAN, RENEWING AMERICA'S SCHOOLS 7 (1993).

13. Thomas Jefferson recognized schools as "the most vital pillars of human happiness and security." THOMAS JEFFERSON, CRUSADE AGAINST IGNORANCE 18 (Gordon C. Lee ed., 1961) ("Jefferson was like the Greeks in holding citizenship as man's chief vocation and preparation for that citizenship as society's chief concern"). *Id.* at 21; *See also* Ambach v. Norwick, 441 U.S. 68, 76-77 ((1979); JOHN DEWEY, DEMOCRACY AND EDUCATION 115 (1916).

14. Mary Jane Guy, *The American Common School: An Institution at Risk*, 21 J.L. & EDUC. 569, 580 (1992).

15. *See* McDuffy v. Secretary of the Executive Office of Educ., No. S-6128, 1993 WL 213006, at *20 (Mass. June 15, 1993) ("The town school is the only proper introduction to the town meeting"); Rose v. Council for Better Educ., 790 S.W.2d 186, 206 (1989) ("Common schools make patriots and men who are willing to stand upon a common land").

16. *See* McDuffy v. Secretary of the Executive Office of Educ., No. S-6128, 1993 WL 213006, at *19 (Mass. June 15, 1993) ("man is born neither wise nor good").

17. *Id.*

18. As the U.S. Supreme Court noted: "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers--and indeed the older students--demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class." Bethel v. Fraser, 478 U.S. 675, 682 (1986).

19. Sidney Hook, *Bread and Freedom, in* THE DEMOCRACY READER 181 (Diane Ravitch & Abigail Thernstrom eds., 1992) ("it seems clear that there is a very impressive correlation between freedom and bread . . . without political freedom there can be no other freedoms, but only an uncertain and uneasy exercise of privileges

which may be terminated abruptly without anybody's having to account to those who are affected by these decisions").

20. *See* McDuffy v. Secretary of the Executive Office of Educ., No. S-6128, 1993 WL 213006, at *7, *9 (Mass. June 15, 1993).

21. *Id.* at *7.

22. E.P. Cubberley, PUBLIC EDUCATION IN THE UNITED STATES 221 (1934). As Pajak has noted: "Although cultural assimilation may not be entirely possible, *political* assimilation is essential." Edward Pajak, *Change and Continuity in Supervision and Leadership, in* CHALLENGES AND ACHIEVEMENTS OF AMERICAN EDUCATION 179 (Gordon Cawelti ed., 1993), *citing* Henry Giroux, POSTMODERNISM, FEMINISM, AND CULTURAL POLITICS (1991). Duster has identified "a correlation between group separatism and racial hostility." *See* ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA 114 (1991).

23. Theodore H. White, *The American Idea, in* THE AMERICAN READER 373 (Diane Ravitch ed., 1990).

24. The colonists of the Mayflower committed themselves to the concept of collective governance for the common good before disembarking at Plymouth, Massachusetts. *See* DIANE RAVITCH, THE AMERICAN READER 3 (1990).

25. GEORGE WILL, STATECRAFT AS SOULCRAFT 24 (1983).

26. C. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968), *cited in* Bethel School District v. Fraser, 478 U.S. 675, 680 (1986).

27. Not only has the Court recognized the legitimacy of value inculcation in public education, but the Court has held that value inculcation is a legal duty of public schools. *See* Board of Educ. v. Pico, 457 U.S. 853, 869 (1982).

28. 347 U.S. 483, 493 (1954).

29. 457 U.S. 202, 221 (1982).

30. 441 U.S. 68, 77 (1979), *citing* JOHN DEWEY, DEMOCRACY AND EDUCATION 26 (1929).

31. Ambach v. Norwick, 441 U.S. 68, 77 (1979).

32. *Id.*, *citing* R. DAWSON, POLITICAL SOCIALIZATION 146-167 (1969); R. HESS, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN 114, 158-171, 217-220 (1967); V. KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY 323-343 (1961).

33. Board of Educ. v. Pico, 457 U.S. 853, 876 (1982), *citing* Ambach v. Norwick, 441 U.S. 68, 77 (1979).

34. Hazelwood v. Kuhlmeier, 484 U.S. 260, 285-286 (1988).

35. Malcolm Stewart, *The First Amendment, The Public Schools, and the Inculcation of Community Values*, 18 J.L. & EDUC. 23, 27 (1989).

36. The contrast between indoctrination of dogmatic beliefs and inculcation of democratic values is a multi-faceted one. Arguably, it is the distinction between teaching what to think and how to think; coerced belief and free will; conformity and independence; unquestionable and unchanging party doctrine and the progressive individual search for truth. *See also* THOMAS JEFFERSON, CRUSADE AGAINST IGNORANCE 19-21 (Gordon C. Lee ed., 1961).

37. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

38. JOHN ROHR, ETHICS FOR BUREAUCRATS: AN ESSAY ON LAW AND VALUES 75 (1989) (There is a difference between a word or symbol that is vague and one that is meaningless).

39. *See* Thomas Jefferson, *First Inaugural Address, in* THE AMERICAN READER 44 (Diane Ravitch ed., 1990) (in which Jefferson outlines "the essential principles of our Government" and holds that these principles "should be the creed of our political faith" and the "text of civic instruction").

40. JOHN ROHR, ETHICS FOR BUREAUCRATS: AN ESSAY ON LAW AND VALUES 68 (1989).

41. *Id.* Public school educators have sworn to uphold the provisions of federal and state constitutions, and many states's statutes mandate that students receive instruction on the U.S. and state constitutions and democratic institutions.

42. *See Id.* at 68.

43. The U.S. Constitution is the supreme law of the land, and all government activities must be consistent with the Constitution. U.S. Const. art. VI, § 2. All government officers are legally bound to support the Constitution. U.S. Const. art. VI, § 3.

44. American constitutional democracy has an ancient lineage. The architects of our system of governance looked to history for guidance. As John Adams stated: "Let us study the law of nature; search into the spirit of the British Constitution; read the histories of ancient ages; contemplate the great examples of Greece and Rome; set before us the conduct of our British ancestors, who have defended of us the inherent rights of mankind against foreign and domestic tyrants and usurpers, against arbitrary kings and cruel priests; in short, against the gates of earth and hell." *See* John Adams, *Liberty and Knowledge, in* THE

AMERICAN READER 13 (Diane Ravitch ed., 1990).

45. ROBERT S. PECK, THE BILL OF RIGHTS & THE POLITICS OF INTERPRETATION 13 (1992).

46. JOHN ROHR, ETHICS FOR BUREAUCRATS: AN ESSAY ON LAW AND VALUES 74 (1989) ("bureaucrats should be cautioned against letting their consideration of American values harden into a rigid political orthodoxy").

47. *See* Missouri v. Holland, 252 U.S. 416, 443 (1920).

48. *See* David A. Strauss, *The Role of a Bill of Rights*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 539, 554 (Geoffrey R. Stone et al. eds., 1992).

49. ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA 114 (1991); *see also* GUNNAR MYRDAL, AN AMERICAN DILEMMA 3 (1944).

50. ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA 27 (1991).

51. ROBERT S. PECK, THE BILL OF RIGHTS & THE POLITICS OF INTERPRETATION 184 (1992).

52. JOHN ROHR, ETHICS FOR BUREAUCRATS: AN ESSAY ON LAW AND VALUES 73 (1989).

53. *Id.* at 77.

54. *Id.*

55. *Id.* at 81.

56. Fundamental rights are those explicitly or implicitly guaranteed by the Constitution. San Antonio v. Rodriguez, 411 U.S. 411 U.S. 1, 33-34 (1973).

57. U.S. CONST. amend. I.

58. *See* Lee v. Weisman, 112 S.Ct. 2649 (1992); Wisconsin v. Yoder, 406 U.S. 205 (1972); Abington v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

59. Efforts at neutrality and objectivity by the government have been criticized. *See* Nomi Maya Stolzenberg, *"He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 582, 612 (1993) ("The schools' seemingly objective appeal to individual reason plainly inculcated the values of individual choice, toleration, and reason -- values that, rather than transcending culture, derive from and reproduce a liberal, pluralistic society"). But the alternative is an affirmative adoption of a particular and more

narrow ideology. Something that would inflame all factions that did not share that ideology. The result would be increased social tensions and an undermining of common civic governance.

60. MICHAEL W. LA MORTE, SCHOOL LAW: CASES AND CONCEPTS 7-8 (1993).

61. *See* Lee v. Weisman, 112 S. Ct. 2649, 2656 (1992) ("The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere."

62. U.S. CONST. amend. I.

63. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969).

64. *Id.* at 511.

65. Bethel School District v. Fraser, 478 U.S. 675, 680 (1986).

66. *Id.* at 681.

67. U.S. v. Schwimmer, 279 U.S. 644, 655 (1928).

68. Bethel School District v. Fraser, 478 U.S. 675, 683 (1986).

69. Wilson v. Chancellor, 418 F. Supp. 1358, 1368 (D. Or. 1976).

70. There is a basic tension between the needs of the community and the rights of the individual. Undesirable consequences have resulted from the domination of either force. If individuals fail to consider the community interest, the community disintegrates into chaos and disunited factionalism. If the rights of individuals are not respected, society becomes oppressive and authoritarian. Democracy can only succeed in an environment marked by an enlightened balance between responsibilities to the community and individual rights. This balance is achieved through a shared understanding of the importance of both individual rights and community responsibilities. In a democracy, rights and responsibilities are two sides of the same coin. Children acquire this understanding through education in democratic values. Public education serves as a counterbalance against the forces of unenlightened self-interest, teaching about the importance of both the individual and the community. *See also* Amitia Etzioni, *Editorial Statement*, 1 THE RESPONSIVE COMMUNITY, RIGHTS AND RESPONSIBILITIES 2 (1991), *cited in* Mary Jane Guy, *The American Common Schools: An Institution at Risk*, 21 J.L. & EDUC. 569, 577 n.33 (1992) (Etzioni describes "a world in which 'Me-ism' prevails in the body social, runaway greed derails the economy, and interest groups dominate the polity").

71. THOMAS JEFFERSON, CRUSADE AGAINST IGNORANCE 29 (Gordon C. Lee ed., 1961).

72. U.S. CONST. amend. XIV.

73. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3 (4th ed. 1991).

74. 347 U.S. 483 (1954).

75. *Id.* at 493.

76. *See* LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW 2 (1990).

77. *See* Thomas Jefferson, *A Bill for Establishing Religious Freedom in Virginia, in* THE AMERICAN READER 24 (Diane Ravitch ed., 1990).

78. Engel v. Vitale, 370 U.S. 421, 431 (1962).

79. *Id.* at 432.

80. *Id.*

81. *See* Thomas Jefferson, *First Inaugural Address, in* THE AMERICAN READER 42 (Diane Ravitch ed., 1990) ("All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possesses their equal rights, which equal law must protect, and to violate would be oppression").

82. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

83. *See* Thomas Jefferson, *A Bill for Establishing Religious Freedom in Virginia, in* THE AMERICAN READER 24 (Diane Ravitch ed., 1990) ("the truth is great and will prevail if left to herself").

84. As John Adams stated: "Wherever a general knowledge and sensibility have prevailed among the people, arbitrary government and every kind of oppression have lessened and disappeared in proportion." John Adams, *Liberty and Knowledge, in* THE AMERICAN READER 12 (Diane Ravitch ed., 1990).

85. THOMAS JEFFERSON, CRUSADE AGAINST IGNORANCE 28 (Gordon C. Lee ed., 1961).

86. 347 U.S. 483, 494 (1954).

87. One of the goals of the equal protection clause is advancement based on individual merit. *See* Plyler v. Doe, 457 U.S. 202, 221-222 (1982).

88. *See To Provide Financial Assistance to the States for Improved Educational Services for Handicapped Children: Hearings on S. 6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 93rd Cong., 1st Sess. 657 (1973) (statement of Dr. Oliver L. Hurley, University of Georgia) cited in* LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW 4 (1990).

89. 60 U.S. (19 How.) 393 (1857).

90. Korematsu v. United States, 323 U.S. 214 (1944).

91. *See* McDuffy v. Secretary of the Executive Office of Educ., No. S-6128, 1993 WL 213006, at *33 (Mass. June 15, 1993).

92. ROBERT S. PECK, THE BILL OF RIGHTS & THE POLITICS OF INTERPRETATION 4 (1992).

93. Some would argue that the problem of common schools is not that common schools have failed, but that because of financial inequities, common schools have never been achieved. Our nation's contrasting rich and poor public schools are not the democratic common schools envisioned by drafters of state constitutions. *See* Rose v. Council for Better Educ., 790 S.W.2d 186, 206 (Ky. 1989) (citing Delegate Moore at the Kentucky Constitutional Convention of 1890: "Common schools make patriots and men who are willing to stand upon a common land. The boys of the humble mountain home stand equally high with those from the mansions of the city. There are no distinctions in the common schools, *but all stand upon one level*"); JONATHAN KOZOL, SAVAGE INEQUALITIES 207 (1991) ("Democracy can stand certain amounts of inherited advantage. What democracy cannot tolerate is an aristocracy padded and protected by the state itself from competition below").

94. Mary Jane Guy, *The American Common School: An Institution at Risk*, 21 J.L. & EDUC. 569, 594-595 (1992).

95. Our predecessors purchased the liberties they passed to us "at the expense of their ease, their estates, their pleasure, and their blood." JOHN ADAMS, *Dissertation on the Canon and Feudal Law, in* 3 WORKS OF JOHN ADAMS 456 (C.F. Adams ed., 1851).

96. Shelton v. Tucker, 364 U.S. 479, 487 (1960).